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September 27, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP2220-CR

State of Wisconsin v. Nicholas Fredrick Krivinchuk
(L. C. #2014CF151)

Before Stark, P.J., Hruz and Seidl, JJ.

Nicholas Krivinchuk appeals a judgment convicting him of threats to injure and aggravated battery. He contends the circuit court erroneously exercised its discretion when it denied his presentencing motion to withdraw his no-contest pleas. Upon our review of the parties' briefs and the record, we conclude at conference that this case is appropriate for summary disposition; therefore, the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2013-14).

The complaint charged Krivinchuk with two counts of disorderly conduct—domestic abuse, criminal damage to property, felony intimidation of a victim, aggravated battery—

domestic abuse, and armed robbery. By letter dated October 7, 2014, Krivinchuk's attorney, Lance Morgan Nelson, made a plea offer with Krivinchuk's authorization:

Pleas to the 2 counts of Disorderly Conduct, and a count 5 reduced to Substantial Battery. He gets maxed out on jail for both DC counts, consecutive to each other (6 months of confinement), and sentence is withheld on the felony Battery. He does 18 months of probation on the felony Battery, with typical conditions.

The letter detailed weaknesses in the State's case, inconsistent statements by the victim and her son, and claimed they were the aggressors in the incident. The district attorney rejected that offer and presented a series of counter-offers. The night before Krivinchuk entered his pleas, he met with his attorney for approximately four hours to discuss the State's final offer. The next morning, Krivinchuk was still equivocal about whether he wanted to accept the final offer. In the hallway outside of court, Krivinchuk informed his attorney that he would accept the offer, and they filled out the plea questionnaire.

On October 17, 2014, Krivinchuk entered no-contest pleas to threats to injure and aggravated battery. The plea questionnaire and the circuit court's plea colloquy established Krivinchuk's understanding of the elements of the offenses, the potential penalties and the constitutional rights he waived by pleading no contest. The court accepted the no-contest pleas and scheduled the sentencing hearing for December 19, 2014.

On November 17, 2014, attorney Nelson filed motions to withdraw the no-contest pleas and to withdraw as counsel. The circuit court granted the motion to withdraw as counsel and replacement counsel was appointed. The motion to withdraw the pleas was based on "the compressed timeframe," and the undue pressure it placed on Krivinchuk. The motion alleged Krivinchuk "has decided that the terms of the agreement are not in his best interest." On

January 13, 2015, Krivinchuk filed a pro se motion to withdraw his pleas, alleging the victim and her son were the aggressors and he was acting in self-defense. On January 14, Krivinchuk's replacement counsel also filed a motion to withdraw the no-contest pleas, and submitted an affidavit from Krivinchuk stating his belief that he is innocent, his pleas were entered in haste and confusion because he did not fully understand the nature and extent of his right to assert self-defense, he was coerced by his attorney into pleading no contest, and the State would not be prejudiced by the plea withdrawal.

At the hearing on the motion to withdraw the pleas, Krivinchuk and his father testified regarding the time constraints and pressure attorney Nelson placed on Krivinchuk to accept the State's final offer. Attorney Nelson denied pressuring Krivinchuk, and the court found Nelson's testimony more credible than that of Krivinchuk and his father. Krivinchuk does not challenge that credibility determination on appeal, and bases his appeal entirely on Nelson's testimony. Nelson's testimony established Krivinchuk had an eighth grade education and, in order to understand something, he needed to "read it over and over numerous times ... and slowly read it." Nelson inferred that Krivinchuk had a learning disability.

A defendant seeking to withdraw a plea prior to sentencing must establish a "fair and just reason" to do so other than a desire to have a trial or that he changed his mind. *State v. Rhodes*, 2008 WI App 32, ¶7, 307 Wis. 2d 350, 746 N.W.2d 599; *State v. Nelson*, 2005 WI App 113, ¶11, 282 Wis. 2d 502, 701 N.W.2d 32. Whether to allow presentencing plea withdrawal is committed to the circuit court's discretion. *Rhodes*, 307 Wis. 2d 350, ¶7. When the circuit court has followed the court-mandated and statutory requirements during the plea colloquy, a defendant will ordinarily have difficulty showing a fair and just reason for plea withdrawal. *State v. Jenkins*, 2007 WI 96, ¶60, 303 Wis. 2d 157, 736 N.W.2d 24. All that is needed for this

court to sustain a circuit court's discretionary decision upholding the plea is that the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Id.*, ¶30.

Although Krivinchuk acknowledges this court's deferential standard of review, his brief stresses the factors the circuit court considers when deciding a motion to withdraw a plea, in effect urging this court to substitute our judgment for the circuit court's. We reject the invitation to ignore the deferential standard of review. Rather, we conclude the record supports the circuit court's decision.

Krivinchuk's primary basis for withdrawing the no-contest pleas is that his decision to accept the plea offer was rushed. Attorney Nelson testified he spent four hours with Krivinchuk the day before the plea hearing discussing the plea offer. Although Krivinchuk did not reach a final decision until minutes before the plea hearing, a defendant is not entitled to withdraw a plea on the ground that it was hasty merely because the decision was reached at the last moment. *See Rhodes*, 307 Wis. 2d 350, ¶12. The record shows Krivinchuk had ample time to consider the offer. Krivinchuk was fully aware of the weaknesses in the State's case and the possibility of persuading a jury that he acted in self-defense. The circuit court found Krivinchuk was not confused about the charges and potential defenses, and the plea colloquy supports that finding. Because the circuit court conducted a proper colloquy and its decision denying the motion to withdraw the pleas was based on relevant facts and the proper standard of law and demonstrated a rational process, the court properly exercised its discretion.

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21
(2013-14).

Diane M. Fremgen
Clerk of Court of Appeals